

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Children's Television Obligations of Digital)	MM Docket No. 00-167
Television Broadcasters)	
)	
)	

**REPLY COMMENTS OF
CHILDREN'S MEDIA POLICY COALITION
FREE PRESS
CAMPAIGN FOR A COMMERCIAL-FREE CHILDHOOD
DADS AND DAUGHTERS**

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SUMMARY

The Children’s Media Policy Coalition, joined by Free Press, the Campaign for a Commercial-Free Childhood, and Dads and Daughters (“Coalition *et al.*”), supports the Federal Communications Commission’s tentative conclusion to restrict interactivity with commercial matter and urges the Commission to promptly adopt the Coalition *et al.*’s proposal. In these reply comments the Coalition *et al.* address the objections of commenters who oppose regulation at this time.

First, the Commission should reject the commenters’ argument that the Commission should abstain from or delay in adopting regulations to protect children from excessive commercials. Interactive television is an established technology that is widely used in the United States and around the world. Multiple companies have developed and deployed the platforms to deliver interactive television, content producers are including interactive features in their programming, and national and local advertisers are using interactive television advertising. Interactivity is not a “nascent” technology and the Commission’s proposal will both protect children and provide the industry with certainty. The well documented evidence of over-commercialization of children’s television programs supports the prompt adoption of regulation, not formal monitoring.

Second, the Commission should abandon its parental “opt in” proposal and reject commenters’ proposed parental “opt out” approach. The commenters’ “opt out” approach does not give parents any real choice in what information their children access because it does not distinguish between commercial and non-commercial content. Further, there is no currently existing technology to allow parents to control interactivity, and an “opt in” or an “opt out” would result in violations of the commercial matter time limits.

Third, the Commission should reject Disney’s request to exempt video on demand (“VOD”) and subscription video on demand (“SVOD”) services from children’s programming regulations. Regardless of the way television commercials are delivered to children, the result is the same: children have a limited ability to recognize and defend against commercial persuasion. The Commission should protect children equally and apply the children’s programming regulations to these services.

Finally, commenters’ claim that the Commission does not have statutory authority to adopt its proposal and that such a prohibition would violate the First Amendment is simply wrong. The FCC has clear authority under its general public interest authority and the Children’s Television Act (“CTA”) to implement the Coalition *et al.*’s proposed regulation. The plain language of the CTA gives the Commission authority to regulate any commercial interactivity on television. Moreover, banning interactivity from children’s programming and commercials is clearly constitutional as a regulation of commercial speech under the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*. Under the first prong of the test, the Commission can entirely prohibit commercial interactivity because it is misleading to children. Even if commercial interactivity is not misleading, the Commission can prohibit commercial interactivity because the restriction directly advances the substantial government interest in protecting children. The Commission’s proposal is the least restrictive means because other avenues, such as “spot” advertising, print ads, and interactivity outside of children’s programming are available to advertisers.

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Children Now, American Psychological Association, American Academy of Pediatrics, Action Coalition for Media Education, American Academy of Child and Adolescent Psychiatry, Benton Foundation, National Institute on Media and the Family, National PTA, and Office of Communication of the United Church of Christ, Inc. ("Children's Media Policy Coalition" or "Coalition"), joined by Free Press, the Campaign for a Commercial-Free Childhood, and Dads and Daughters ("Coalition *et al.*"), by their attorneys the Institute for Public Representation, respectfully submit these reply comments in response to comments filed by broadcasters, cable operators, and other interested parties opposing the Federal Communication Commission's ("FCC" or "Commission") proposed action in the above referenced proceeding.

**I. THE COMMISSION SHOULD ACT PROMPTLY TO ENSURE
THAT INTERACTIVITY BENEFITS CHILDREN**

Several commenters argue that regulation of interactivity at this time would be premature. Specifically, they argue that: 1) regulation at this time would stifle the development of interactive technology,¹ 2) regulation is unnecessary because there is no evidence of harm or

¹ See Comments of The Walt Disney Company, MM Docket No. 00-167, April 1, 2004 at 8 (Disney Comments).

“misuse” of interactive television advertising,² and 3) the Commission should wait until it decides on its web-site reference rules.³ But, as demonstrated below, none of these arguments justifies leaving children unprotected by delaying the prohibition of interactivity during children’s programming that connects viewers to commercial matter.

A. The Promulgation of Rules at This Time Will Not Stifle the Development of Interactive Services.

Some commenters claim that interactive technology is “in its infancy”⁴ and, based on this premise, argue that the Commission should refrain from regulating until “the technology and its applications are established.”⁵ In the interim, they ask for “regulatory flexibility” so that “children’s television programmers ... [can] experiment freely with different services and their associated business models.”⁶ This argument is flawed because interactive television technologies are neither “nascent” nor in their “early stages.” Technology companies have developed and widely deployed the platforms to deliver interactive television, content producers are using these technologies to include interactive features in their programming, and advertisers are making interactive television advertisements. Regulatory certainty, not regulatory flexibility, will protect children and will provide the industry with assurance that the business models they adopt will comply with applicable regulations.

² See Comments of the National Association of Broadcasters, MM Docket No. 00-167, April 1, 2004 at 2 (NAB Comments).

³ See Disney Comments at 9-10.

⁴ Comments of Nickelodeon, MM Docket No. 00-167, April 1, 2004 at 1 (Nickelodeon Comments). Nickelodeon also pointed out that the recently released Kaiser Family Foundation report on Children and Media did not include interactive television in the study. *Id.* at 2. Nickelodeon fails to mention that Instant Messaging was similarly left out of the Kaiser Family Foundation’s 1999 report on Children and Media, and yet, 6 years later, it has become one of the most popular computer activities among children. Kaiser Family Foundation, Generation M: Media in the Lives of 8-18 Year-olds, Executive Summary at 38 (2005).

⁵ Nickelodeon Comments at 4.

⁶ Disney Comments at 8.

1. Technology Companies, Content Producers, and Advertisers are Actively Deploying Interactive Technologies and Content.

Commenters contend that interactive television is a “nascent technology,” but many American companies are already using interactive technologies to deliver interactive content, particularly interactive advertising, to audiences in the United States and abroad. In fact, “roughly 24 million ITV-enabled set-top boxes” are already deployed in American homes.⁷ Interactive television is being delivered all over the world. Content producers are partnering with technology companies to include interactive content in their programs and in their advertisements. National advertisers, such as Pizza Hut, and local advertisers, such as car dealerships, have already used interactive advertising on television. With over half of cable and satellite subscribers already equipped with the middleware necessary to support interactive features⁸ and content producers and advertisers delivering interactive programming and advertising, it is clear that interactive television has already moved beyond a “nascent” technology.

Many technology companies are already developing and deploying the technology to deliver interactive television. For example, Microsoft has developed the platform software used to deliver the interactive television content for TV Cabo in Portugal,⁹ and recently announced a deal with Cablevisión Mexico whereby Cablevision would use Microsoft’s Foundation Edition

⁷ Comments of EchoStar Satellite LLC, MM Docket No. 00-167, April 1, 2004 at 1 (EchoStar Comments).

⁸ Nickelodeon Comments at 3.

⁹ Manuel Jose Damasio, et al., *Interactive Television Usage and Applications: the Portuguese Case Study*, available at <http://uitv.info/papers/damasio04/> (last visited April 28, 2005); *Microsoft TV: Interactive Digital TV Service is Growing in Portugal*, available at http://www.microsoft.com/tv/content/Press/Interactive_Digital_TV_TV_Cabo.msp (last visited April 28, 2005).

platform to deliver digital, interactive content.¹⁰ Microsoft has also recently announced an agreement with Verizon to deliver interactive television throughout Verizon's fiber-optic network.¹¹ Ed Graczyk, Microsoft TV's director of marketing and communications, calls it "a commercial agreement with real, committed dollars" and not merely a trial of the technology.¹²

Other platform developers, including NDS,¹³ OpenTV,¹⁴ TiVo, and Navic Networks, are already deploying digital television technologies that allow advertisers to take advantage of interactive advertising. For example, OpenTV has developed television marketing campaigns by Ford and L'Oreal to show how interactive television advertising effectively and efficiently increased brand recognition and allowed advertisers to reach potential consumers in a cost-effective manner.¹⁵ Navic Networks develops interactive overlays for advertisements that allow television viewers to purchase products directly from their television, and this technology is already being used in Hawaii, where viewers can order from the local Pizza Hut using only their remote control.¹⁶

¹⁰ *Microsoft TV: Cablevisión Mexico and Microsoft TV Foundation Edition 1.7*, available at http://www.microsoft.com/tv/content/Press/cablevision_mexico.msp (last visited April 28, 2005).

¹¹ ITVT E-mail Newsletter, *Verizon to Use Microsoft TV for its "FiOS" TV Service*, Issue 5.87, Part 2 (Feb. 18, 2005). This is in addition to agreements Microsoft has already made with BellSouth and SBC to deliver IP-based interactive television over their networks. *Id.*

¹² *Id.*

¹³ News Corporation partly owns NDS. Investor Relations - NDS Information, at http://www.nds.com/investor_relations/investor_info.html (last visited April 28, 2005).

¹⁴ Liberty Media partly owns OpenTV. OpenTV-The Company at <http://www.opentv.com/company/> (last visited April 28, 2005).

¹⁵ Jeffrey N. Brown, OpenTV Paper, Broadcast Asia 2003 Conference, available at <http://www.broadcastpapers.com/data/BCA03OpenTVInteractTVRevenues-print.htm> (last visited April 28, 2005).

¹⁶ Steve Donahue, *Quiet, Nosy Navic Might Be Watching*, Multichannel News, May 3, 2004, at <https://extranet.hcp.com/stuff/contentmgr/files/f19361feb37edf2e2d12a3322ffa97dd/news/navic.htm> (last visited April 28, 2005).

Content producers already include interactive features in their programming, including children's programming. In September 2004, Disney Channel UK produced an interactive broadcast of "Kids Awards: Buried Treasure," where viewers could answer trivia questions and earn prizes and gifts using their remote control.¹⁷ Nickelodeon UK uses the NDS platform to deliver interactive television games to viewers.¹⁸ A Vice-President of Nickelodeon UK praised the ability of interactive games to get viewers to "stick" with their channels.¹⁹ Discovery Networks Europe has used the NDS platform to deliver interactive programming in the UK since 2001, and has produced 89 different interactive applications in only two years.²⁰ In one of its applications, Discovery re-launched the quiz show "Mastermind" and allowed viewers to vote for the "brainiest" contestant while charging the viewers a fee for each vote.²¹ GSN, formerly the Game Show Network, is partnering with Sony to introduce a loyalty program whereby viewers are rewarded with points for participating in the interactive features on GSN programs that can then be redeemed for Sony products.²²

National and local advertisers are already using interactive television advertisements to target children and adults. For example, Nabisco is introducing interactive television advertisements for its Kellogg's brand of cereal. These advertisements use games and other

¹⁷ Ensequence, *Case Study: Disney Channel UK*, at <http://www.broadcastpapers.com/data/EnsequenceDisneyCaseStudy01.htm> (last visited April 28, 2005).

¹⁸ NDS, *Value@TV Case Study: Nickelodeon*, available at http://www.nds.com/pdfs/Nickelodeon_casestudy.pdf (last visited April 28, 2005).

¹⁹ *Id.*

²⁰ NDS, *Value@TV Case Study: Discovery*, available at http://www.nds.com/pdfs/Discovery_casestudy.pdf (last visited April 28, 2005).

²¹ *Id.*

²² ITVT E-mail Newsletter, *GSN Launches Loyalty Program for Users of its ITV Applications*, Issue 5.87, Part 1 (Feb. 18, 2005).

interactive services featuring Nabisco brands to target children.²³ Chrysler has recently entered into an agreement with DirecTV to deliver interactive advertising to DirecTV subscribers.²⁴ Even local car dealerships, such as Larry Miller Hyundai in Phoenix, are using interactive advertising to schedule a test drive, or even to have the dealership bring the car to the viewer's door.²⁵

Advertisers will also be able to use viewer information to create personalized interactive advertisements. For example, Fox is offering advertisers the ability to alter their commercials to appeal to different audiences.²⁶ This service "let[s] an advertiser modify a single ad in various ways, minutes before it airs."²⁷ The American Film Institute's ("AFI") Enhanced TV Workshop is another example of this trend.²⁸ In 2002, the AFI's workshop newsletter laid out plans for developing a prototype interactive advertising model where viewers would be presented with information about the product, participate in a quiz about the product, and then be transported to a "prize fulfillment center" where they could choose prizes or purchase other related products.²⁹

As the facts above illustrate, contrary to commenters' claims, interactive television, and particularly interactive advertising, is already an integral part of the digital television landscape.

²³ Interactive TV Advertising Show, *Weapon7 Develops ITV Ad for Kellogg's Low-Sugar Frosties* (Jan. 18, 2005), available at http://www.interactive-tv-advertising.com/news_35.htm (last visited April 28, 2005).

²⁴ Steve Donohue, *Taking ITV for a Drive; DirecTV Imports a BSkyB Model for Chrysler 300 Spot*, MULTICHANNEL NEWS, April 18, 2005, at 24.

²⁵ Joe Mandese, *Press Your Remote, Get a Car Delivered*, BROADCASTING AND CABLE, April 11, 2005, at 16.

²⁶ Brian Steinberg, *Next Up on Fox: Ads That Can Change Pitch*, WALL STREET J., April 21, 2005, at B1.

²⁷ *Id.* The article also notes that broadcasters are keen to deploy this type of technology as soon as possible: "One factor driving the broadcast networks to get on board: Cable is ahead of the game." *Id.*

²⁸ AFI Enhanced TV Workshop, available at <http://www.afi.com/education/etv/> (last visited April 28, 2005).

²⁹ AFI Enhance TV Workshop, *Production in Review*, Sept. 26, 2002, available at <http://www.afi.com/education/etv/newsletters/etv92602.pdf> (last visited April 28, 2005).

Prompt regulation will protect children from over-commercialization on television and will provide the industry with regulatory certainty that the business models they adopt today comply with the requirements of the CTA.

2. Prompt Action Will Protect Children and Provide Certainty Without Stifling Interactivity.

Disney argues that the Commission should refrain from regulating at this time and adopt “regulatory flexibility.”³⁰ Disney claims the Commission has a “well-established policy of refraining from regulation during the early stages of product development in order not to burden nascent services.”³¹ As discussed above, interactivity has already progressed beyond the early stages of development.

Moreover, even if interactivity were still in its infancy, prompt action would still be necessary to protect children. It is not the case that the Commission always refrains from regulating a new technology at the early stages of development. For example, the Commission recognized that the digital transition and digital television technologies would exacerbate the problem of content pirating and therefore adopted the use of the ATSC flag to protect content.³² The Commission stated “that by taking preventative action today, we can forestall the development of a problem in the future.”³³ Here, as with content piracy, interactive television will likely lead to the aggravation of a problem: the over-commercialization of children’s television. Prompt action in this proceeding will ensure that the use of interactive television will not result in further over-commercialization of children’s television.

³⁰ Disney Comments at 8.

³¹ Disney Comments at 8-10. To support this assertion Disney tries to analogize this situation to Voice over Internet Protocol, cable modem, and ultrawideband. *Id.* at 9.

³² *Digital Broadcast Content Protection*, 18 FCC Rcd 23550 (2003).

³³ *Id.* at 23554.

In arguing for regulatory flexibility, commenters seek the freedom to develop business models that expose children to excessive commercialization. Once these business models become entrenched, the industry members will fight to protect their investments. For example, in response to the Commission's newly adopted web-site address display rule, several parties submitted Petitions for Reconsideration arguing that the new rule was "burdensome."³⁴ As The WB Television Network explained:

[t]his synergy [between web sites and programming], which ultimately supports the continued broadcast of high-quality, entertaining children's television programming, depends on revenues generated by advertising and the sale of merchandise on the site. The Commission's new rule threatens to preclude or drastically limit such activities...³⁵

In essence, WB's complaint is that the rule would force them to abandon a business model they claim has become an integral part of financing children's programming.³⁶ This is a complaint the Commission will almost surely face again should it decide to refrain from regulating interactive advertising at this time.

Adopting regulation at this time will both protect children and provide the industry with certainty about what is and is not allowed. It will not stifle the development of interactive television services because the industry is free to try out any interactive services it wishes so long as they do not occur in the programming that is produced and broadcast primarily for an

³⁴ See Petition for Reconsideration of The WB Television Network, MM Docket No. 00-167, February 2, 2005, at 18 (WB Petition); Petition for Reconsideration of Nickelodeon, MM Docket No. 00-167, February 2, 2005 at 21.

³⁵ WB Petition at 18. Just because interactive advertising would generate significant revenues, a part of which might go to support children's programming, does not make it an acceptable practice that is in the public interest. If so, there would be no constraints at all on commercial broadcast practices targeting children, and licensees would be permitted to pursue maximum profit potential in selling to the child market. But it is well established that young children experience significant limitation in their ability to recognize and defend effectively against commercial persuasion which has led the Commission to protect children from excessive and exploitative commercial practices. The Commission's current efforts to restrict interactive advertising to children are consistent with past policy.

³⁶ *Id.*

audience of children 12 years old and younger. Moreover, broadcasters and cable programmers are free to utilize interactivity in children's programming so long as it does not involve commercial matter. Many of the examples cited by commenters, such as interviews with a program's star, a spelling game,³⁷ and sing-along features,³⁸ do not seem to involve commercial matter and would therefore be permitted under the Coalition *et al.*'s proposal.

Finally, Disney contends that the Commission should engage in a process of "[c]ontinued monitoring" and "ongoing dialogue between industry representatives and the Commission."³⁹ The Coalition *et al.* agree that it is important for the Commission to monitor developments in children's programming and advertising. However, such monitoring is not a substitute for regulation. Moreover, any ongoing dialogue must include members of the public interest community as well as industry.

B. The Problems of Over-Commercialization are Sufficient to Justify Commission Action at This Time.

Some commenters argue that the Commission need not regulate interactivity during children's programming because there is no evidence of harm to children. For example, NAB contends that "there is no evidence, and no logical basis" to think that broadcasters would "misuse digital interactivity."⁴⁰ However, as the Coalition *et al.* noted in their comments,⁴¹ the many problems associated with excessive commercialization in children's programming are well known and well documented. Since 1974, the Commission has recognized the "special responsibilit[ies]" broadcasters have to children because of children's limited ability to defend

³⁷ Disney Comments at 8.

³⁸ Nickelodeon Comments at 6.

³⁹ Disney Comments at 6.

⁴⁰ NAB Comments at 2.

⁴¹ Comments of the Children's Media Policy Coalition, Free Press, Campaign for a Commercial-Free Childhood, and Dads and Daughters, MM Docket No. 00-167, April 1, 2004 ("Coalition *et al.* Comments").

themselves against advertisements.⁴² In 1990, Congress concluded that the industry's efforts were not enough, and mandated limits on the amount of commercial matter shown during children's programming.⁴³ Last year, a Task Force of experts assembled by the American Psychological Association compiled an extensive review of literature regarding commercialization and childhood development, and concluded that many children simply cannot distinguish between commercial matter and programming content and even more children are limited in their ability to recognize and defend against commercial persuasion.⁴⁴ In light of children's unique susceptibility to advertising and Congress' and the FCC's recognition that regulation is necessary, it is entirely predictable that, in the absence of regulation, interactive advertising will be used to take advantage of children. Commenters offer no evidence to think otherwise. Moreover, as the Commission has recognized, "it is better to take action to protect children from excessive commercialization before we are presented with evidence of abuses."⁴⁵

Other commenters incorrectly assert that the Commission's primary concern is the ability to connect children to the Internet via interactive television, and that, because such a connection is not part of their current interactive service offerings, the Commission need not regulate.⁴⁶ Yet, even the "walled garden" services being offered by commenters such as EchoStar, Disney, and Nickelodeon can present significant opportunity to engage children with commercial matter,

⁴² *Petition for Action for Children's Television for Rulemaking Looking Toward the Elimination of Sponsorship and Commercial Content in Children's Programming and the Establishment of a Weekly 14-Hour Quota of Children's Television Programs*, 50 FCC 2d 1, 11 (1974) ("1974 Policy Statement").

⁴³ Children's Television Act, 47 U.S.C. § 303a (2002).

⁴⁴ Report of the Task Force of the American Psychological Association, *Psychological Issues in the Increasing Commercialization of Children*, at <http://www.apa.org/releases/childrenads.html> (last visited April 28, 2005) ("APA Report").

⁴⁵ *Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992; Direct Broadcast Satellite Public Interest Obligations*, 19 FCC Rcd 5647, 5666 (2004) (extending the CTA's commercial time limits to DBS service providers) ("DBS Order").

⁴⁶ Nickelodeon Comments at 4-5; Disney Comments at 4-5.

such as through “advergimes” or other interactive marketing techniques.⁴⁷ Further, the Navic Networks platform allows advertisers to make direct sales to children via interactive television without connecting the viewer to the Internet.⁴⁸ Thus, the non-Internet interactive services offered by commenters and others also present the opportunity to expose children to excessive levels of commercial matter, in contravention of the intent of Congress and the Commission.

C. The Commission Should Reject Proposals to Delay the Adoption of Rules Until the Commission Completes Reconsideration of the Website Reference Rule.

Disney argues that the Commission should refrain from promulgating rules because “[r]ules regarding interactivity in children’s television programming would address the same primary concern that motivated the” web-site address display rule and, therefore, “rules regarding interactivity...should flow from” the website address display rule.⁴⁹ However, Disney’s comparison of the non-interactive display of a website address to interactive advertising is not persuasive because interactive services are different from the display of a website address.

Interactive television advertising presents viewers with an immediate opportunity to engage with commercial matter. The display of a website address does not provide children with a seamless transition. Also, a child who accesses a website address is free to explore the entire Internet. As Nickelodeon explains, interactive advertising is different because it can include “a closed environment where children cannot access material on the Internet at large, but are

⁴⁷ An “advergame” is an interactive game that is used to deliver an *embedded* advertising message. Coalition *et al.* Comments at 14.

⁴⁸ Steve Donahue, *Quiet, Nosy Navic Might Be Watching*, Multichannel News, May 3, 2004, at <https://extranet.hcp.com/stuff/contentmgr/files/f19361feb37edf2e2d12a3322ffa97dd/news/navic.htm> (last visited April 28, 2005).

⁴⁹ Disney Comments at 9-10. Petitions for Reconsideration were filed in response to the Report and Order and Further Notice of Proposed Rulemaking adopted *In the Matter of Children’s Television Obligations of Digital Television Broadcasters*, 19 FCC Rcd 22943 (2004) (“Order & FNPRM”).

confined to a ‘walled garden’ of material specifically intended for each particular interactive application.”⁵⁰ Therefore, unlike in its previous preceding, the Commission must tailor its rules to account for immediate access to commercial matter that could be provided to children in a “walled garden” or on the Internet.

II. THE COMMISSION SHOULD NOT ADOPT AN “OPT OUT” OR AN “OPT IN” APPROACH

Nothing in other comments persuades the Coalition *et al.* that “opt in” or “opt out” would adequately protect children.⁵¹ EchoStar LLC argues that “an ‘opt out’ regime may be more readily implemented” than an “opt in” regime and explains that parent’s can “disable access to EchoStar’s current ‘walled garden’ interactive offering.”⁵² What EchoStar allows parents to do is either “opt out” of all interactivity and forgo the beneficial uses of interactive television or do nothing and expose their children to all commercial interactivity. Merely disabling the interactive features does not achieve the Commission’s goal of giving parents the ability to “control what information their children can access.”⁵³ The Commission should not force parents to choose between denying their children access to beneficial interactivity and exposing their children to excessive commercial interactivity. Moreover, any “opt out” regime places a great burden on parents and leaves children unprotected.

Tim Collings, the inventor of the V-Chip, suggests that the V-Chip can “be used to help parents control access to interactive program elements by creating additional ratings to describe

⁵⁰ Nickelodeon Comments at 5.

⁵¹ In fact, Disney explains why allowing a parent option is unworkable. Disney Comments at 12-13. Disney explains that it is unclear how parental consent will be obtained and that parents who don’t “opt in” may not know interactivity is available. *Id.* This same reasoning applies to “opt out.” If parents do not know they can “opt out” they will be unable to control what information their children access.

⁵² EchoStar Comments at 3.

⁵³ *Order & FNPRM*, 19 FCC Rcd at 22967.

interactive program elements.”⁵⁴ However, his proposal would require the creation of a ratings system.⁵⁵ As the Coalition has outlined in previous comments, the current ratings system has “not been developed and deployed in a way that ensures successful adoption by parents.”⁵⁶ It is well document that many parents do not recognize, understand, or use the TV ratings systems and V-Chip.⁵⁷ There is no evidence that an interactive ratings system would not suffer from the same problems.

Finally, none of the commenters explain how children’s access to interactive commercials can be limited to the commercial time limits. The Commission explained, a traditional 15-30 second commercial can “last much longer” if it includes interactive elements.⁵⁸ To ensure compliance with the commercial matter time limits the Commission must be able to account for time. As the Coalition *et al.* noted in its comments,⁵⁹ the inability to develop a practicable solution to this question leads to the conclusion that parents should not be allowed to “opt out” or “opt in” and commercial interactivity must be prohibited.

III. THE COMMISSION SHOULD NOT EXEMPT VIDEO-ON-DEMAND SERVICES FROM CHILDREN’S TELEVISION REGULATIONS

The Commission has determined that the commercial time limits apply “regardless of the free or pay status of the channel.”⁶⁰ However, Disney requests that the Commission exempt

⁵⁴ Comments of Tim Collings, MM Docket No. 00-167, April 1, 2005 at 3.

⁵⁵ The Coalition *et al.* does not support creating a new ratings system, but if and when a new ratings system is considered the Coalition *et al.* should be included in its development.

⁵⁶ Comments of the Children’s Media Policy Coalition, MM Docket No. 04-261, October 15, 2004, at 5. Despite these problems, the Coalition believes that a robust, reliable TV ratings and V-chip system would help parents deal with sexual, violent, or other adult-oriented programming.

⁵⁷ *Id.*

⁵⁸ *Order & FNPRM*, 19 FCC Rcd at 22968.

⁵⁹ Coalition *et al.* Comments at 19-20.

⁶⁰ *Order & FNPRM*, 19 FCC Rcd at 22960.

video-on-demand (“VOD”) and subscription video-on-demand (“SVOD”) services from the commercial time limits already imposed and any updated regulation that the Commission adopts in this proceeding.⁶¹ The Coalition *et al.* oppose this request.

The fact that a household may request a VOD program at any time instead of having to watch a program at a set time on a particular channel is irrelevant. As the Commission correctly explained the children’s digital television Order, “the same concerns that led to adoption of the advertising restrictions in the 1974 *Policy Statement* and the CTA – the unique vulnerability of children as television viewers – apply regardless of the channel that a child viewer watches.”⁶² This same rationale applies to VOD/SVOD.

Disney claims that VOD/SVOD services should be exempt because parents must order the programming and fast forward functions allow parents to skip through commercial.⁶³ First, children, not parents, could order the VOD/SVOD service. Second, it is unrealistic to think that parents will always watch the programming with their children and fast forward through the commercials. Just as the Commission has applied the commercial time limits to Digital Broadcast Satellite services and cable services, despite the fact that households must pay a subscription fee, the Commission should also clarify that these rules apply to VOD/SVOD services.

Furthermore, exempting VOD/SVOD services from advertising limits would encourage the industry to move children’s programming to VOD/SVOD services. Some children’s television shows are currently moving to VOD,⁶⁴ and companies are already delivering VOD

⁶¹ Disney Comments at 16-17.

⁶² *Order & FNPRM*, 19 FCC Rcd at 22960.

⁶³ Disney Comments at 17.

⁶⁴ Frank Ahrens, *Comcast, PBS Plan New Service; Cable System Will Offer Children's Programs on Demand*, WASH. POST, April 5, 2005, at E4.

advertisements on digital television. For example, Reebok is delivering VOD advertisements that allow audiences in Philadelphia to watch a 30-second spot and use their remote control to access four one-minute “bonus spots” which feature interviews with celebrities that Reebok’s global director of interactive marketing thinks “would be very compelling to [Reebok’s] youth market.”⁶⁵

It is reasonable to conclude that exempting these services will encourage the industry to deliver even more children’s programming and advertisements in a VOD/SVOD format. This would leave VOD/SVOD developers free to develop children’s programs that violate the CTA’s requirements, as well as other rules which have been the centerpiece of the Commission’s efforts to protect children. Also, if children’s programming does move to VOD/SVOD services, it will likely limit the amount of children’s programming available to children in households that do not or cannot afford to subscribe to VOD services.

IV. THE CHILDREN’S TELEVISION ACT AUTHORIZES THE FCC TO REGULATE COMMERCIAL INTERACTIVITY

Some commenters question the Commission’s authority to regulate commercial interactivity. They argue that: 1) it is not clear that the CTA provides the Commission with authority, “especially given that interactive services did not exist at the time of enactment,”⁶⁶ 2) interactive website links are outside the scope of the CTA because they are not “on television,”⁶⁷ and 3) “Congress stated that [the commercial time limits] were ‘far less restrictive than complete bans’” and because the Commission is proposing a ban, it is exceeding its discretion under the

⁶⁵ Kris Oser, *Reebok, encouraged by “Terry Tate,” expands its definition of i-marketing*, ADVERTISING AGE, April 25, 2005, at 44.

⁶⁶ Disney Comments at 10-11.

⁶⁷ NAB Comments at 5.

CTA.⁶⁸ The Commission, under its general public interest authority and the CTA, has authority to prohibit interactivity with commercial matter.

First, the mere fact that a technology did not exist when a statute was passed does not foreclose the FCC from regulating that technology. The Commission has exercised its statutory authority to reach new technologies. For example, the Commission interpreted the CTA to apply to DBS despite finding that “[w]hile the [CTA] specifically applies to broadcasters and cable operators, we do not believe that this was intended as a specific and permanent exemption for DBS, which was not yet a commercial service” when the CTA was enacted.⁶⁹ Consequently, the Commission can certainly redefine commercial matter to reach interactivity.

Second, the Commission is clearly regulating interactivity “on television.” NAB fails to recognize the Commission’s proposal regulates what can be displayed on television, not what can be displayed on the Internet. Further, NAB assumes that all interactive links will connect to the Internet. That is not the case. As demonstrated above, many companies’ interactive services will be limited to a “walled garden.”⁷⁰

Third, NAB overstates the breadth of the Commission’s proposed regulation. The Commission’s and the Coalition *et al*’s proposals do not amount to a complete ban because traditional advertising spots are still allowed during children’s programming.⁷¹ In fact, NAB’s argument demonstrates why limiting advertising to traditional spots is necessary. NAB explains that measuring the amount of time spent “with interactive links is wholly impractical” and further explains that “it would be difficult, if not impossible, for broadcasters to predict, and

⁶⁸ *Id.* at 6.

⁶⁹ *DBS Order*, 19 FCC Rcd at 5668.

⁷⁰ *See supra* Section I(C).

⁷¹ NAB argues that the proposed regulation is overbroad under the CTA because it would restrict all commercial interactivity. NAB Comments at 6-7.

impossible for them to control, how much time a viewer may spend at an advertiser's website."⁷²

The CTA clearly requires the Commission to limit the amount of time children are exposed to commercial matter. Therefore, prohibiting commercial interactivity is the only way to enforce compliance with the commercial time limits.

V. COMMERCIAL INTERACTIVITY CAN BE REGULATED AS COMMERCIAL SPEECH SUBJECT TO LESSER FIRST AMENDMENT SCRUTINY.

In addition to challenging the Commission's statutory authority, NAB claims that any regulation in this arena would "raise serious constitutional questions."⁷³ However, NAB incorrectly argues that strict scrutiny would apply because the Commission proposal would regulate speech on the Internet.⁷⁴ As discussed above, the proposed regulation is directed at television, not the Internet. Moreover, because the proposed regulation governs commercial speech, it would be assessed, not under strict scrutiny, but under the four-pronged commercial speech test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.⁷⁵ The four prongs are: 1) whether the speech is lawful and not misleading, 2) whether there is a substantial governmental interest, 3) whether the regulation directly advances that interest, and 4) whether it is not more extensive than necessary to serve that interest.⁷⁶ The regulation proposed here would readily be found constitutional under this test.

Central Hudson's foundational premise rests on the idea that society benefits from the communication of commercial information because recipients can evaluate that information

⁷² *Id.*

⁷³ *Id.* at 7.

⁷⁴ *See id.*

⁷⁵ 447 U.S. 557 (1980).

⁷⁶ *Id.* at 566.

within its commercial context and use it to “perceive *their own best interest*.”⁷⁷ A child’s cognitive limitations, however, render attainment of this benefit impossible. In fact, as the Senate observed, “children are far more trusting of and vulnerable to commercial[s]” and there is “evidence that *children cannot distinguish* conceptually between programming and advertising; they do not understand that the purpose of a commercial is to sell a product.”⁷⁸ The APA Task Force’s recent findings confirm this conclusion.⁷⁹ Given a child’s inability to evaluate the difference between programming and advertising, commercial interactivity is necessarily misleading to child viewers. Since the societal benefits envisioned by *Central Hudson* cannot be achieved where children are the commercial speech recipients, the government can prohibit such speech.

Even if commercial interactivity in children’s programming were not misleading, the proposed restriction would survive under the remaining parts of the *Central Hudson* test. Protecting children has consistently been found to be, at least, a substantial governmental interest.⁸⁰ There is no question that “children are a unique and special concern of the state,”⁸¹ and that the goal of protecting them from over-commercialization, as consistently found by both

⁷⁷ *Id.* at 562 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976)) (emphasis added).

⁷⁸ S. REP. 101-227 at 2 (emphasis added) (citing *1974 Policy Statement*).

⁷⁹ See APA Report at 5-9 (examining the ability of children to comprehend the nature of commercials and finding that children are not able to recognize persuasive intent). See also, *supra* Section I(B).

⁸⁰ See S. REP. 101-227 at 14 (citing, *inter alia*, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Miller v. California*, 413 U.S. 15 (1973); *Ginsberg v. New York*, 390 U.S. 629 (1968)). See also, H.R. REP. 101-385 at 8-9 (citing the same cases)

⁸¹ H.R. REP. 101-385 at 8. See also, S. REP. 101-227 at 14.

the Commission and Congress,⁸² is sufficiently substantial to meet *Central Hudson*'s second requirement.

A ban on commercial interactivity would directly advance the substantial interest in protecting children from over-commercialization. As discussed above, commercial interactivity bears a high likelihood of resulting in commercial exposure that violates the FCC's commercial time limits.⁸³ Prohibiting the use of these commercial features in children's programming will help ensure compliance through easily measured traditional "spots."

Finally, prohibiting commercial interactivity during children's programming is the least restrictive means of furthering the government's substantial interest. Traditional spots in children's programming that comply with the FCC's limits and interactive commercial matter aired outside of children's programming would remain unaffected by the regulation.⁸⁴ Moreover, advertisers could still seek other avenues, such as print and radio advertisements to reach children.

⁸² See generally, S. REP. 101-227 at 14-15; H.R. REP. 101-385 at 8-9; 1974 *Policy Statement*, 50 FCC 2d at 11.

⁸³ See *supra* Section II(C).

⁸⁴ Because there are still other means of expression available to commercial advertisers for the same commercial speech, the restriction amounts to no more than a minimally restrictive "time, place, and manner restriction." Thus, the proposed regulation would ensure compliance with FCC limits, and operate as nothing more than a restriction, and not a true ban. This restriction is consistent with the Supreme Court's observation that the *Central Hudson* test "is 'substantially similar' to the test for time, place, and manner restrictions." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001) (quoting *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989)). As the House Report accompanying the CTA found, "[t]he limits set forth in [the CTA] are far less restrictive than *these* complete bans [on cigarettes, alcohol, and gambling advertisements], which the courts repeatedly have upheld." H.R. REP. 101-385 at 10 (emphasis added).

Commenters have pointed out that the nature of commercial interactivity does not lend itself to easy enforcement of the CTA limits against over-commercialization,⁸⁵ and no commenter proposed a means of measuring commercial interactivity.⁸⁶ Consequently, prohibiting commercial interactivity during children's programming is necessarily the least restrictive regulation that can be promulgated. In sum the Commission's proposed regulation meets the *Central Hudson* test because commercial activity is misleading to children. Even if commercial interactivity is not misleading, the regulation is the least restrictive means and directly advances the substantial governmental interest in protecting children.

CONCLUSION

For the above stated reasons, the Coalition *et al.* urge the Commission to promptly prohibit commercial interactivity during children's programming and during commercials aired during or adjacent to children's programming. This prohibition should apply to broadcast, cable, and DBS providers as well as VOD/SVOD services.

Respectfully Submitted,

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⁸⁵ NAB Comments at 6-7; Disney Comments at 14-15. *See also, Order & FNPRM*, 19 FCC Rcd at 22968.

⁸⁶ For further discussion on this point, see *supra* Section II.